

## § 768.2

falls within the TAC's area of technical expertise.

[61 FR 12915, Mar. 25, 1996, as amended at 61 FR 68585, Dec. 30, 1996; 62 FR 25469, May 9, 1997]

### § 768.2 Foreign availability described.

(a) *Foreign availability.* Foreign availability exists when the Secretary determines that an item is comparable in quality to an item subject to U.S. national security export controls, and is available-in-fact to a country, from a non-U.S. source, in sufficient quantities to render the U.S. export control of that item or the denial of a license ineffective. For a controlled country, such control or denial is "ineffective" when maintaining such control or denying a specific license would not restrict the availability of items that would make a significant contribution to the military potential of the controlled country or combination of countries detrimental to the national security of the United States (see sections 5(a) and 3(2)(A) of the EAA.)

(b) *Types of foreign availability.* There are two types of foreign availability:

- (1) Foreign availability to a controlled country; and
- (2) Foreign availability to a non-controlled country.

(NOTE TO PARAGRAPH (b) OF THIS SECTION: See § 768.7 of this part for delineation of the foreign availability assessment procedures, and § 768.6 of this part for the criteria used in determining foreign availability)

### § 768.3 Foreign availability assessment.

(a) *Foreign availability assessment.* A foreign availability assessment is an evidentiary analysis that BIS conducts to assess the foreign availability of a given item according to the assessment criteria, based on data submitted by a claimant, the data gathered by BIS, and the data and recommendations submitted by the Departments of Defense and State and other relevant departments and agencies, TAC committees, and industry. BIS uses the results of the analysis in formulating its recommendation to the Secretary on whether foreign availability exists for a given item. If the Secretary determines that foreign availability exists, the Secretary will decontrol the item

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for national security reasons or approve the license in question if there is no foreign policy reason to deny the license, unless the President exercises a National Security Override (see § 768.7 of this part). The effect of any such determination on the effectiveness of foreign policy controls may be considered independent of this part.

(b) *Types of assessments.* There are two types of foreign availability assessments:

- (1) Denied license assessment; and
- (2) Decontrol assessment.

(c) *Expedited licensing procedures.* See § 768.8 of this part for the evaluation of eligibility of an item for the expedited licensing procedures.

[61 FR 12915, Mar. 25, 1996, as amended at 61 FR 68585, Dec. 30, 1996]

### § 768.4 Initiation of an assessment.

(a) *Assessment request.* To initiate an assessment, each claimant or TAC must submit a FAS or a TAC Certification to BIS. TACs are authorized to certify foreign availability only to controlled countries. Claimants can allege foreign availability for either controlled or non-controlled countries.

(b) *Denied license assessment.* A claimant whose license application BIS has denied, or for which it has issued a letter of intent to deny on national security grounds, may request that BIS initiate a denied license assessment by submitting a Foreign Availability Submission (FAS) within 90 days after denial of the license. As part of its submission, the claimant must request that the specified license application be approved on the grounds of foreign availability. The evidence must relate to the particular export as described on the license application and to the alleged comparable item. If foreign availability is found, the Secretary will approve the license for the specific items, countries, and quantities listed on the application. The denied license assessment procedure, however, is not intended to result in the removal of the U.S. export control on an item by incrementally providing a country with amounts that, taken together, would constitute a sufficient quantity of an item. The Secretary will not approve

on foreign availability grounds a denied license if the approval of such license would itself render the U.S. export control ineffective in achieving its purpose. In the case of a positive determination, the Secretary will determine whether a decontrol assessment is warranted. If so, then BIS will initiate a decontrol assessment.

(c) *Decontrol assessment.* (1) Any claimant may at any time request that BIS initiate a decontrol assessment by a FAS to BIS alleging foreign availability to any country or countries.

(2) A TAC may request that BIS initiate a decontrol assessment at any time by submitting a TAC Certification to BIS that there is foreign availability to a controlled country for items that fall within the area of the TAC's technical expertise.

(3) The Secretary, on his/her own initiative, may initiate a decontrol assessment.

(d) *BIS mailing address.* All foreign availability submissions and TAC certifications should be submitted to: Department of Commerce, Bureau of Industry and Security, 14th Street and Pennsylvania Avenue, NW, Room 3877, Washington, DC 20230.

**§ 768.5 Contents of foreign availability submissions and Technical Advisory Committee certifications.**

(a) All foreign availability submissions must contain, in addition to information on product or technology alleged to be available from foreign sources, at least:

- (1) The name of the claimant;
- (2) The claimant's mailing and business address;
- (3) The claimant's telephone number; and
- (4) A contact point and telephone number.

(b) Foreign availability submissions and TAC certifications should contain as much evidence as is available to support the claim, including, but not limited to:

- (1) Product names and model designations of the items alleged to be comparable;
- (2) Extent to which the alleged comparable item is based on U.S. technology;

(3) Names and locations of the non-U.S. sources and the basis for claiming that the item is a non-U.S. source item;

(4) Key performance elements, attributes, and characteristics of the items on which a qualitative comparison may be made;

(5) Non-U.S. source's production quantities and/or sales of the alleged comparable items and marketing efforts;

(6) Estimated market demand and the economic impact of the control;

(7) Product names, model designations, and value of U.S. controlled parts and components incorporated in the items alleged to be comparable; and

(8) The basis for the claim that the item is available-in-fact to the country or countries for which foreign availability is alleged.

(c) Supporting evidence of foreign availability may include, but is not limited to, the following:

- (1) Foreign manufacturers' catalogs, brochures, operation or maintenance manuals;
- (2) Articles from reputable trade and technical publications;
- (3) Photographs;
- (4) Depositions based on eyewitness accounts; and
- (5) Other credible evidence.

NOTE TO PARAGRAPH (c) OF THIS SECTION: See Supplement No. 1 to part 768 for additional examples of supporting evidence.

(d) Upon receipt of a FAS or TAC certification, BIS will review it to determine whether there is sufficient evidence to support the belief that foreign availability may exist. If BIS determines the FAS or TAC certification is lacking in supporting evidence, BIS will seek additional evidence from appropriate sources, including the claimant or TAC. BIS will initiate the assessment when it determines that it has sufficient evidence that foreign availability may exist. Claimant and TAC certified assessments will be deemed to be initiated as of the date of such determination.

(e) Claimants and TACs are advised to review the foreign availability assessment criteria described in § 768.6 of this part and the examples of evidence described in Supplement No. 1 to part